ORIGINAL

RECEIVED

2008 JAN 29 A 9:30

AZ CORP COMMISSION
DOCKET CONTROL

05

BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN MAYES
Commissioner
GARY PIERCE
Commissioner

Arizona Corporation Commission
DOCKETED
JAN 29 2008
DOCKETED BY nr

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS

DOCKET NO. T-01051B-07-0693
DOCKET NO. T-03608A-07-0693

ARIZONA DIALTONE, INC.'S BRIEF REGARDING ARBITRABILITY OF INTERCONNECTION DISPUTE WITH QWEST CORPORATION

Pursuant to the Procedural Order dated January 16, 2008 (the "Procedural Order") issued by Administrative Law Judge Sarah N. Harpring under the authority of the Arizona Corporation Commission (the "Commission"), Arizona Dialtone, Inc. ("AZDT") hereby submits its brief regarding the arbitrability of the issues set forth in the Petition for Arbitration (the "Petition") filed by Qwest Corporation ("Qwest").

I. QWEST'S AUTHORITY TO PETITION FOR ARBITRATION UNDER 47 U.S.C. § 252

Section 252(b)(1) of the Telecommunications Act of 1996 (the "Act") states:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiations under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

47 U.S.C. § 252(b)(1) (emphasis added). As the underscored language indicates, § 252(b)(1) of

the Act contemplates that the event triggering the right to petition for arbitration is a request for negotiations made by a competitive local exchange carrier ("CLEC") to an incumbent local exchange carrier ("ILEC"). In this case, however, as the Commission correctly notes in the Procedural Order, the request for negotiations was made by the ILEC (Qwest), not the CLEC (AZDT). The question therefore arises whether a request for negotiations made by an ILEC, rather than to an ILEC, is sufficient to trigger the right to petition for arbitration.

Undersigned counsel has reviewed relevant federal case law, the implementing regulations found in the Code of Federal Regulations (Title 51), and the Arizona Administrative Code as it pertains to arbitration before the Arizona Corporation Commission (R14-2-1501, et seq.), but has been unable to locate any legal authority regarding whether a request for negotiations by an ILEC is sufficient to trigger the right to petition for arbitration before a State commission. In the absence of such authority, the parties and this Commission are left with the bare language of § 252(b)(1) and general principles of statutory construction.

The plain language of § 252(b)(1) makes clear that the triggering event regarding the right to petition for arbitration is the receipt by an ILEC of a request for negotiations. The statute could have been written to provide that a request for negotiations to or from an ILEC is sufficient to trigger the right to petition for arbitration, but obviously, the statute does not so read. Therefore, consistent with the fundamental principle of statutory construction that unambiguous statutory language must be interpreted according to its plain meaning,[1] there would appear to be no basis for allowing a request for negotiations by an ILEC to trigger the right to petition for arbitration. Similarly, the principle of statutory construction that the expression of one or more items in a class excludes the items not expressed,[2] the omission of a request for negotiations by an ILEC as an event triggering the right to petition for arbitration must be deemed intentional. Thus,

---

[1] Powers v. Carpenter, 203 Ariz. 116, 118 ¶9, 51 P.3d 338, 340 (2002).

[2] State v. Roscoe, 185 Ariz. 68, 71, 912 P.2 1297, 1300 (1996).

as a matter of straightforward statutory analysis, it would appear that a request for negotiations made by an ILEC to a CLEC is insufficient to trigger a right to arbitration under § 252(b)(1).

However, the principle of statutory construction that a statute will be construed to avoid absurd results[3] militates in favor of treating a request for negotiations by an ILEC as an arbitration-triggering event. After all, it is somewhat illogical to allow a request for negotiations by a CLEC, but not a request for negotiations by an ILEC, to trigger the right to petition for arbitration. Moreover, there is a logical explanation for why the statute reads as it does. The purpose of the Telecommunications Act of 1996 was to open local telephony markets to competition. Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Services, L.L.C., 425 F.3d 964, 966 (11th Cir. 2005). In order to facilitate that goal, § 252(b)(1) of the Act allows a CLEC to seek arbitration of the terms and conditions of an interconnection agreement with an ILEC after first serving the ILEC with a request for negotiations. In other words, the right to petition for arbitration was designed to protect the rights of newly emerging competitors (CLECs) to force formerly monopolistic ILECs to enter into interconnection agreements. In this context, it does not appear that the statutory scheme contemplated the scenario presented in this case, where it is the ILEC, not the CLEC, which has served a request for negotiations. In other words, there is a reasonable historical explanation for why § 252(b)(1) is one-sided with respect to the right to request negotiations, thereby triggering the right to petition for arbitration.

In conclusion, AZDT does not oppose arbitration in this matter if the Commission decides to retain jurisdiction, so long as: (1) Qwest's Petition for Arbitration and parallel Complaint are consolidated, and (2) the consolidated matters are set for hearing on a normal timeline rather than the accelerated timeline required for arbitration matters.

[3] Arpaio v. Steinle, 201 Ariz. 353, 355 ¶5, 35 P.3d 114, 116 (App. 2001).

II. APPLICABILITY OF 47 U.S.C. § 252 ARBITRATION TIMELINES

As noted above, and as stated at the Joint Procedural Conference held on January 14, 2008, AZDT does not oppose, and in fact, favors, consolidation of Qwest's Petition for Arbitration and its parallel Complaint because the Petition and Complaint substantially overlap in terms of the factual bases therefor and the relief requested therein. As a result, it would seem obvious that it is more efficient and economical to consider the Petition and the Complaint in a consolidated proceeding rather than hearing those matters separately.

If the Petition and Complaint are consolidated, AZDT's position is that the consolidated matters should be set for hearing on the normal timeframe for non-arbitration matters pending before the Commission, rather than on the accelerated timeframe for arbitration matters mandated by the Act. To be clear, AZDT is not seeking to defer a hearing on the consolidated matters for any substantial length of time, but does believe that the hearing on the Petition, preliminarily scheduled for February 11, 2008, would be premature in the event of consolidation. More specifically, AZDT requests that the Commission: (1) consolidate the Petition and Complaint, and (2) set the consolidated matters for hearing in or after April 2008.

RESPECTFULLY SUBMITTED this 28th day of January, 2008.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

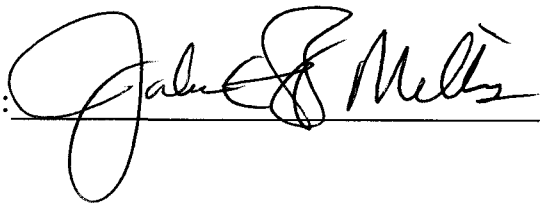
By _____
Claudio E. Iannitelli, Esq.
Glenn B. Hotchkiss, Esq.
Matthew A. Klopp, Esq.
Attorneys for Respondent, Arizona Dialtone, Inc.

ORIGINAL and 13 copies of the foregoing filed this 28 day of January, 2008, with:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing mailed this 28 day of January, 2008, to:

Norman G. Curtright, Esq.
Qwest Corporation
20 East Thomas Road, 16th Floor
Phoenix, AZ 85012

By: 

N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Brief re Arb of IC Disputes 01 28 07 car.doc